U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

November 24, 2004

The Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism,
and Homeland Security
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Please find enclosed unclassified responses to questions arising from the appearance of Assistant Attorney General Daniel Bryant and FBI Deputy Assistant Director Thomas J. Harrington, before the Subcommittee on May 18, 2004, concerning H.R. 3179, the "Anti-Terrorism Intelligence Tools Improvement Act of 2003." We are transmitting the classified portion of our responses under separate cover.

We appreciate the opportunity to present our views. Please do not hesitate to call upon us if we may be of further assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

William E. Moschella
Assistant Attorney General

Attachment

cc: The Honorable Bobby Scott
Ranking Minority Member

Responses of
Daniel J. Bryant
Assistant Attorney General
Department of Justice

To Questions Arising from His May 18, 2004, Appearance before the
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
U.S. House of Representatives

Concerning
H.R. 3179, "The Anti-Terrorism Intelligence Tools Improvement Act of 2003"

1. How many times has the Department of Justice been asked by the Committee on the Judiciary or its subcommittees to testify in reference to the PATRIOT Act? Do you have a record of other interactions the Department has had with the Committee on the Judiciary and its subcommittees concerning the PATRIOT Act, for example, through briefings, letters, etc.? If so, can you please make them available to our Subcommittee?

The Department has provided answers to more than 520 oversight questions regarding the USA PATRIOT Act. Further, in the 108th Congress alone, we have sent over 100 letters to Congress that specifically address the USA PATRIOT Act. We have enclosed two examples of letters we sent to the Committee regarding terrorism. The Department also has provided witnesses at over 50 terrorism-related hearings. We have conducted numerous formal and informal briefings with Members and staff, although, unfortunately, we have no way to tabulate how many times the USA PATRIOT Act was discussed in those briefings. However, we are pleased to share the following statistics about overall Department responsiveness to Congress.

During this Administration, an enormous amount of time and resources have been spent responding to congressional oversight and inquiries. In the 107th Congress, we replied to over 8,500 letters from Members of Congress, we testified at 256 hearings, we answered over 2000 individual questions for the record following hearings, and we issued 102 views letters on legislation at the request of Congress. During the 108th Congress, as of October 31, 2004, we have replied to over 6,200 letters from Members of Congress, we have testified at over 195 hearings, and we have answered over 3,000 individual questions for the record following hearings. This activity does not include the myriad informal briefings for staff and Members, which number well into the hundreds.

2. In an ACLU press release entitled, "House Judiciary Committee Considers Patriot Expansion Legislation: ACLU Strongly Objects to Unwarranted Increase in Spying Power," Laura W. Murphy, Director of the ACLU Washington Legislative Office, says that Congress needs to evaluate the balance between public safety and

civil liberties "before reducing judicial review of government wiretapping and taking other steps to reduce government accountability." In your view, does H.R. 3179 reduce the judicial review of government wiretapping and government accountability?

I do not believe that H.R. 3179 reduces the judicial review of government wiretapping and government accountability. Rather, H.R. 3179 respects and maintains traditional avenues of judicial oversight. For example, H.R. 3179 would amend the Foreign Intelligence Surveillance Act (FISA) to allow for the surveillance of international terrorists who are unaffiliated with an international terror group or whose affiliation is not known. It would not change in any way the judge's role in the FISA process or the requirement that the government demonstrate to a judge that there is probable cause to believe that the target of surveillance is a foreign power or an agent of a foreign power. It would merely amend the definition of "agent of a foreign power" to include non-United States persons who "engage[] in international terrorism or activities in preparation therefor." Similarly, H.R. 3179 also would specify procedures for the Attorney General to seek judicial enforcement of national security letters (NSLs). NSLs are similar to administrative subpoenas and constitute requests for information. They cannot be enforced, however, absent a court order, and H.R. 3179 explicitly respects the role of the judiciary in enforcing an NSL. Finally, while H.R. 3179 would amend the Classified Information Procedures Act (CIPA) to improve the Department's ability to safeguard classified information during the course of criminal proceedings, it would not affect in any way whatsoever the showing that the United States must make to a judge under section 4 of CIPA to obtain judicial authorization to withhold classified information from criminal defendants or take other steps to safeguard classified information during the discovery process. Rather, it would only allow the United States to make such a request ex parte and in camera to ensure that such information is not disclosed in the process of protecting it.

3. **The ACLU states in reference to H.R. 3179, "The new proposal would increase the government's powers to secretly obtain personal records without judicial review, limit judicial discretion over the use of secret evidence in criminal cases, eliminate important foreign intelligence wiretapping safeguards and allow use of intelligence wiretaps in immigration cases without notice and an opportunity to suppress illegally acquired evidence." Do you agree with these assertions? Please respond to each of these allegations.**

I do not agree with any of these assertions. To begin with, H.R. 3179 would not "increase the government's powers to secretly obtain personal records without judicial review." Rather, it specifies procedures for the Attorney General to seek judicial enforcement of NSLs and would create a statutory provision imposing criminal liability on those knowingly violating NSL non-disclosure requirements. Under H.R. 3179, the government could not unilaterally enforce an NSL to obtain information. Rather, if a recipient refused to comply with an NSL, the government would be required to seek enforcement of that NSL in court.

Moreover, H.R. 3179 would not limit judicial discretion over the use of secret evidence in criminal cases. This legislation does not in any way provide authority for the government to introduce in criminal cases evidence that is not seen by the defendant. Section 4 of CIPA already allows the United States to make a request to delete specified items of classified information from documents to be made available to a criminal defendant during discovery, to substitute a summary of the information for such classified documents, or to submit a statement admitting relevant facts that the classified information would tend to prove in lieu of providing the documents themselves. H.R. 3179 would simply allow the United States to make such a request ex parte and in camera. H.R. 3179 would not affect in any way whatsoever the showing that the United States must make to a judge under section 4 of CIPA to obtain judicial authorization to withhold classified information from criminal defendants or take other steps to safeguard classified information during the discovery process. Rather, it would only ensure the United States is able to make such a request ex parte and in camera to ensure that such information is not disclosed in the process of protecting it.

Additionally, H.R. 3179 would not eliminate important foreign intelligence wiretapping safeguards. This legislation would not change in any way the judge's role in the FISA process or the requirement that the government demonstrate to a judge that there is probable cause to believe that the target of surveillance is a foreign power or an agent of a foreign power. Rather, it would merely amend the definition of "agent of a foreign power" to include non-United States persons who "engage[] in international terrorism or activities in preparation therefor" and thus allow for the surveillance of international terrorists who are unaffiliated with an international terror group or whose affiliation is not known.

Finally, H.R. 3179 would not allow use of intelligence wiretaps in immigration cases without notice and an opportunity to suppress illegally acquired evidence. H.R. 3179 would eliminate the requirement that the government notify aliens whenever it intends to use evidence obtained through FISA in immigration proceedings. However, it would not affect the government's obligation to disclose the evidence itself to aliens. The government would still be obliged to disclose to aliens any information it intends to use in immigration proceedings if such disclosure is otherwise required by law. Under H.R. 3179, the government simply would not have to reveal the fact that the information in question was obtained through FISA.

4. Mr. Barr claimed that H.R. 3179 is unneeded. Do you agree? If not, what specific needs does H.R. 3179 meet?

I do not agree that H.R. 3179 is unneeded. H.R. 3179 is needed to close a dangerous gap in FISA's coverage by allowing for the surveillance of "lone wolf" terrorists -- international terrorists who are unaffiliated with an international terror group or whose affiliation is not known. A single foreign terrorist with a chemical, biological, or radiological weapon could inflict catastrophic damage on this country. Consequently, there is no reason why the government should be able to conduct FISA surveillance only of foreign terrorists who are known to be affiliated with international terrorist groups.

H.R. 3179 would meet other specific needs as well. It would better safeguard the integrity of sensitive terrorism and espionage investigations in which NSLs are used by creating a new statutory provision imposing criminal liability on those knowingly violating NSL non-disclosure requirements. It also would help the Department to obtain vital information in terrorism investigations quickly and discreetly by specifying procedures for the Attorney General to seek judicial enforcements of NSLs. It would furthermore ensure that the United States does not have to disclose classified information as part of the process of protecting it under section 4 of CIPA. And finally, it would eliminate the Hobson's choice that the government may currently face in immigration proceedings involving evidence collected through FISA: either not using the information in immigration proceedings and possibly permitting dangerous aliens to remain in the country, or using the information and notifying an alien that it is using information acquired through FISA, thus running the risk of jeopardizing sensitive ongoing investigations.

5. Mr. Barr stated that looking at the "lone wolf" provision, we find that this would reach very, very broadly and affect the fundamental underpinnings of the entire FISA structure that has been built up? How would you respond to this statement?

I strongly disagree with that statement. Amending FISA to allow for the surveillance of "lone wolf" terrorists is a modest expansion of the statute. For example, the House Committee report on FISA suggested that a "group" of terrorists covered by current law might be as small as two or three persons, and the interests that courts have found to support the constitutionality of FISA are unlikely to differ appreciably between a case involving a terrorist group of two or three persons and a case involving a single terrorist. Moreover, it is important to point out that H.R. 3179 would not change the standard for conducting surveillance of any United States person but rather would apply only to foreign terrorists. Finally, H.R. 3179 would not change in any way the judge's role in the FISA process or the requirement that the government demonstrate to a judge that there is probable cause to believe that the target of surveillance is a foreign power or an agent of a foreign power. It would merely amend the definition of the term "agent of a foreign power" to include non-U.S. person terrorists who are unaffiliated with an international terrorist group, or whose affiliation is not known.

6. Is this the right time for H.R. 3179, or is it "premature" as Mr. Barr suggested?

The Department supports H.R. 3179 and urges the Congress to pass this piece of legislation in a prompt manner. The Department does not believe that passage of this legislation would be premature. Our nation faces determined terrorist enemies who are seeking to inflict catastrophic damage upon our country, and investigators need all appropriate tools at their disposal to gather the intelligence necessary to detect and disrupt terrorist plots and thus prevent terrorist attacks.

7. Mr. Barr expressed concern that the "Department of Justice may well abuse its authority" and pointed, when asked for a specific example, to a D.C. or Northern Virginia case that extends down to Georgia? Do you know of any such cases that show the abuse of expanded authority? How would you respond to the fears that these abuses occur because the FISA warrant prevents disclosure?

I am unaware of any case where any provision of the USA PATRIOT Act has been abused. With respect to fears of abuses under FISA, there are numerous safeguards in FISA to ensure that abuse does not occur. In addition to being subject to multiple levels of scrutiny within the Justice Department, any surveillance must be approved by a Federal judge with the limited exception of emergency situations where such surveillance can only be conducted for a very limited period of time (72 hours) without judicial approval and must be approved by a judge for surveillance to continue after that time period has expired. Moreover, the Department must submit reports every six months to Congress detailing its use of FISA authorities.

8. Mr. Barr stated, "Insofar as provisions of the PATRIOT Act and provisions of H.R. 3179 would prevent them [defendants] from knowing that there is evidence going to be used against them that has been gathered under FISA, as opposed to the standard applicable under the Fourth Amendment, yes, it would result in, could result in, a violation of their Fourth Amendment rights." Would you agree with this statement? How would the distinction between criminal investigations and foreign intelligence investigations affect Mr. Barr's assertions?

I do not agree with Mr. Barr's statement. I do not believe that any provision in H.R. 3179 would result in the violation of any person's Fourth Amendment rights. Congress, for instance, provided in 1996 that the government need not notify an alien that evidence used against that alien in alien terrorist removal proceedings was obtained through FISA, and H.R. 3179 would simply extend this rule to all immigration proceedings. The government still would be obliged to disclose to aliens any evidence used in the proceedings, if such disclosure was otherwise required by law. Courts have recognized the differences between criminal investigations and foreign intelligence investigations, particularly with respect to the need for secrecy in foreign intelligence investigations, in upholding the constitutionality of FISA, and I see nothing in H.R. 3179 that would affect those decisions.

9. Do you agree with Mr. Barr that the government should give up those powers under the PATRIOT Act that it has not exercised?

No, I strongly disagree with that view. The Department of Justice has sought to utilize the authorities contained in the PATRIOT Act in a responsible manner. However, just because the need may not have arisen to use a particular provision of the PATRIOT Act to date, that does not mean that there won't be a need to use that provision in the future. Many policemen, for example, rarely – or perhaps never – draw their revolvers. That does not mean, however, that they should not be able to carry guns.

10. Do you believe that the "sneak and peek" provision should have a sunset?

No, I do not believe that section 213 of the PATRIOT Act, which allows courts, in certain narrow circumstances, to give delayed notice that a search warrant has been executed, should have a sunset. Delayed notification search warrants are a long-existing, crime-fighting tool that have been upheld by courts nationwide for decades. Section 213 simply created a uniform statutory standard to govern the issuance of such warrants. Courts can delay notice under section 213 only when immediate notification may result in death or physical harm to an individual, flight from prosecution, evidence tampering, witness intimidation, serious jeopardy to an investigation, or undue delay of a trial. Moreover, section 213, in all cases, requires law enforcement to give notice that property has been searched or seized. It simply allows agents to delay temporarily when the required notification is given. Section 213 should not sunset at the end of 2005 because the need for law enforcement to obtain delayed notification search warrants will not go away at that time. In the years to come, it will still be the case that immediate notification of a search warrant, in a minority of cases, may result in the intimidation of a witness, flight from prosecution, destruction of evidence, physical injury, serious jeopardy to an investigation, or even death. And in those cases, courts should be able to issue delayed notification search warrants, as has been done for decades.

11. Mr. Barr stated that the true "lone wolf" does not exist because all terrorists have links to terrorist organizations. Would you agree with this statement? Mr. Barr continues, "Under existing FISA standards, without removing the nexus to foreign power, the Department of Justice can go after that person if they show as little as one other person with whom they are dealing as part of their conspiracy or their activities. The provision is simply unnecessary to break the important link between the President's national security power and the extraordinary power of gathering evidence outside the Fourth Amendment." How would you respond to this statement?

I do not agree that all terrorists necessarily have links to terrorist organizations. Rather, some terrorists may operate independently, and such lone wolf terrorists are capable of inflicting terrible damage on this country with a biological or chemical weapon. Moreover, in other cases, a terrorist may have links to a terrorist organization, but investigators may not be able to demonstrate probable cause that those links exist, or may not be aware of them at all. In such cases, it is vital that FISA allow for the surveillance of such terrorists.

Amending FISA to cover lone wolf international terrorists would constitute only a modest expansion of the statute. Mr. Barr is correct that a group of terrorists covered by the current law might be as small as two or three people. However, the interests that the courts have found to justify FISA procedures are not likely to differ appreciably between a case involving a group of two or three persons and a case involving a single terrorist. For example, because the international terrorism in which a lone wolf terrorist would be involved would continue to "occur totally outside of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons

they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum," 50 U.S.C. § 1801(c)(3), these circumstances would implicate the "difficulties of investigating activities planned, directed, and supported from abroad," just as current law implicates such difficulties in the case of foreign intelligence services and foreign-based terrorist groups. *United States v. Duggan*, 743 F.2d 59, 73 (2d Cir. 1984). Moreover, information developed in the investigation of a lone wolf terrorist, just as in the case of the investigation of a foreign terrorist group, requires special handling because of the need to maintain the secrecy of lawful counterintelligence sources and methods.

12. Mr. Barr claimed that "there's no incentive whatsoever and no way to hold the Government to narrow its requests under the FISA provisions." How would you respond to this statement?

In addition to being subjected to multiple levels of rigorous scrutiny within the Department of Justice, all requests for surveillance under FISA must be approved by the FISA court, with the limited exception of emergency situations where such surveillance can only be conducted for a very limited period of time (72 hours) without judicial approval and must be approved by a judge for surveillance to continue after that time period has expired. The judges of the FISA court perform a valuable function by serving as an independent check, reviewing all requests for FISA surveillance and thus ensuring that the Department strictly complies with the terms of FISA.

13. Is the government "relying more and more on National Security Letters as opposed to judicial subpoenas because they're so easy to get," as Mr. Barr asserts? Please provide the Subcommittee with the context of when a "judicial subpoena" may and may not be used in both a criminal investigation and in a foreign intelligence investigation, as well as when a National Security Letter may and may not be used.

The statutory authorities for the issuance of National Security Letters require certification by senior FBI officials that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities. While the FBI seeks to use all proper authorities in its efforts to prevent terrorist acts, it does not use National Security Letter authority, or any other investigative authority, because it is "easy." National Security Letters are a necessary legal mechanism to obtain critical information for national security investigations. The authority is similar to, but more limited than, administrative subpoena power provided to federal agencies in other investigations, including criminal investigations of health care fraud and violations of the Controlled Substances Act.

In criminal investigations, grand-jury subpoenas may be issued to obtain relevant records. In foreign intelligence investigations concerning international terrorism or espionage, investigators may obtain limited types of relevant records, including communications transaction records, financial reports, and credit information, through the use of National Security Letters.

Responses to Post-Hearing Questions for the U.S. Department of Justice from The Honorable Bobby Scott

1. I am concerned about the constitutionality of Section 4, the so-called 'lone wolf' provision. Would DOJ object to an alternative that creates a presumption that an individual planning a terrorist attack alone is an agent of a foreign power, particularly if that helped to ensure that FISA remains constitutional by retaining the requirement of a connection to a foreign power?

The Department supports the language currently contained in section 4 of H.R. 3179 and is confident that it would satisfy constitutional requirements. Amending FISA to cover lone wolf international terrorists would constitute only a modest expansion of the statute. A group of terrorists currently covered by FISA might be as small as two or three people. However, the interests that the courts have found to justify FISA procedures are not likely to differ appreciably between a case involving a group of two or three persons and a case involving a single terrorist. For example, because the international terrorism in which a lone wolf terrorist would be involved would continue to "occur totally outside of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum," 50 U.S.C. § 1801(c)(3), these circumstances would implicate the "difficulties of investigating activities planned, directed, and supported from abroad," just as current law implicates such difficulties in the case of foreign intelligence services and foreign-based terrorist groups. *United States v. Duggan*, 743 F.2d 59, 73 (2d Cir. 1984). Moreover, information developed in the investigation of a lone wolf terrorist, just as in the case of the investigation of a foreign terrorist group, requires special handling because of the need to maintain the secrecy of lawful counterintelligence sources and methods.

The Department does not support an alternative creating a presumption that an individual planning a terrorist attack alone is an agent of a foreign power. The Department believes that FISA should cover all non-U.S. person lone wolf terrorists. Under the alternative, however, the FISA court would have the ability to deny the government's request for FISA surveillance even if the government were able to show probable cause that the alien in question was engaging or preparing to engage in international terrorism. For this reason, the alternative would not plug the current gap in FISA's coverage as effectively as would section 4 of H.R. 3179.

2. When the Senate passed the so-called "lone wolf" bill, it included a provision imposing FISA reporting requirements. Would DOJ object to including similar reporting requirements in H.R. 3179?

The Department opposes the additional FISA reporting requirements that were included in S. 113 because some of these requirements would upset the longstanding balance between the Executive and Legislative branches regarding the President's right to control the dissemination and handling of classified information. In particular, the

Department strongly opposes the provision in S. 113 requiring the Department to report to the House and Senate Judiciary Committees the number of non-United States persons targeted in electronic surveillance, physical search, pen register/trap and trace, and access to business records orders issued by the FISA Court. This provision would include the Judiciary Committees in reporting that is presently done only to the House and Senate Intelligence Committees and would upset the delicate balance between the Executive and Legislative branches of government in the area of intelligence and intelligence-related oversight and reporting. The Department also strongly opposes the provision in S. 113 requiring the disclosure of portions of FISA court pleadings and court orders that deal with "significant constructions or interpretations" of the provisions of FISA as inherently inconsistent with protecting our country's national security. Interpretations by the FISA court of FISA's application to a technique or circumstance could provide adversaries with tools to avoid surveillance.

3. The USA PATRIOT Act expanded the authorization for National Security Letters by removing the requirement of individualized suspicion. Broadly read, the provisions could authorize the FBI to issue NSLs for entire databases, rather than just the records of a particular individual. Is the FBI using NSLs to request and obtain entire databases?

An NSL may be used only pursuant to an open investigation properly authorized under Attorney General Guidelines to protect against international terrorism or clandestine intelligence activities. The NSL may be used to seek information relevant to such an investigation, upon the signature of a senior FBI official, provided that any such investigation of a U.S. person is not conducted solely on the basis of activities protected by the First Amendment to the Constitution.

The specific response to this question is classified and is, therefore, provided separately.

4. Prior proposals have extended the so-called "lone wolf" provision to cover both U.S. persons and non-U.S. persons. Although the provision in H.R. 3179 applies only to non-U.S. persons, I am concerned that if we pass this provision, the FBI and Justice Department will return to this Committee and ask that we extend it to U.S. persons. Is DOJ prepared to assure that it will not come back here and ask for that?

The Department does not have any plans to ask Congress to amend FISA to cover U.S. person lone-wolf terrorists.

Responses to Post-Hearing Questions Submitted by Rep. John Conyers, Jr. for Dan Bryant

1. Section 2 of H.R. 3179 would impose criminal penalties upon persons who receive National Security Letters, including librarians and bookstore owners, and violate the gag orders contained therein. You support this proposal on the grounds that making such information public could jeopardize on-going investigations.

(a) Is it not true that your justification could be used as a rationale for closing all court proceedings, providing no evidence to defendants, and allowing no public disclosure of court proceedings?

Current law already prohibits the recipients of NSLs from disclosing that they have received these requests for information. *See, e.g.*, 12 U.S.C. § 3414(a)(3); 12 U.S.C. § 3414(a)(5)(D); 15 U.S.C. § 1681u(d); 15 U.S.C. § 1681v(c); 18 U.S.C. § 2709(c); 50 U.S.C. § 436(b). Congress wisely chose to enact these nondisclosure provisions in order to safeguard the integrity of the sensitive terrorism and espionage investigations in which NSLs are used. H.R. 3179 would simply provide an explicit penalty for those who violate these existing nondisclosure requirements. Such nondisclosure requirements are a narrowly-tailored mechanism for protecting the security of ongoing intelligence investigations. This justification could not be used as a rationale for closing all court proceedings, providing no evidence to defendants, and allowing no public disclosure of court proceedings. To say the least, these steps would not be narrowly tailored mechanisms for protecting the security of ongoing intelligence investigations.

(b) Would the Department similarly support the imposition of criminal penalties against Department officials who violate judicial non-disclosure orders in terrorism cases? If not, why not? On December 16, 2003, Judge Gerald Rosen of the U.S. District Court for the Eastern District of Michigan ruled that the Attorney General had twice violated a judicial order prohibiting government and defense lawyers in the case of *United States v. Koubriti* from making public statements regarding the case.

Those violating judicial orders of any kind are already subject to being held in contempt in court. The Department is unaware of any legislative proposal to impose additional criminal penalties on Department officials who violate judicial non-disclosure in terrorism cases and would have to review such a proposal before commenting on it.

With respect to the comments made by the Attorney General in the case of *United States v. Koubriti*, it is important to point out that the statements in question made by the Attorney General were inadvertent and in no way intended to either disregard the Court's order, or disrupt the ongoing trial. Moreover, the Attorney General has expressed his regret for making these statements. As the District Court recognized in that case, "the

Attorney General occupies two roles of equal importance, one as the nation's chief prosecutor, and one as the head of an Executive department with responsibilities to keep the public informed on policy matters." The Attorney General takes both of these responsibilities very seriously and is committed to keeping the American people informed of the Justice Department's progress against terrorism, while at the same time avoiding anything that could hinder a fair trial.

(c) In determining whether a person has violated the law by "knowingly" disclosing the receipt of an NSL, must the person know that he is prohibited from disclosing or must he simply know he made the disclosure?

In order to be subject to the criminal penalty set forth in section 2 of H.R. 3179, the recipient of an NSL who discloses the fact that he has received an NSL would have to know that such a disclosure was prohibited by law.

(d) Would the Department support limiting penalties for disclosure of NSLs to only those situations in which it can establish the harm to the national security resulted from the disclosure? If not, why not?

The Department supports the current language of section 2 of H.R. 3179 and would not support limiting that provision to provide criminal penalties only in those situations in which the Department can establish that harm to the national security resulted from the disclosure of an NSL. Current law already prohibits the recipients of NSLs from disclosing that they have received these requests for information under any circumstances, and anyone knowingly violating this nondisclosure requirement should be subject to a criminal penalty. Congress wisely chose to enact this nondisclosure requirement in order to safeguard the integrity of the sensitive terrorism and espionage investigations in which NSLs are used, and we should not weaken this nondisclosure requirement by making the government's ability to enforce it in a meaningful manner dependent on an after-the-fact determination of whether the violation of the requirement in a particular case actually harmed national security. In particular, it is important to point out that, in the context of sensitive intelligence and espionage investigations, it would be difficult for the government to furnish evidence that the disclosure of an NSL actually harmed national security without risking further harm to national security.

2. With respect to section 4, the "lone wolf" provision, would the Department object to an alternative that creates a presumption that an individual planning a terrorist attack is an agent of a foreign power, particularly if that helped to ensure that FISA remains constitutional by retaining the requirement of a connection to a foreign power?

The Department supports the language currently contained in section 4 of H.R. 3179 and is confident that it would satisfy constitutional requirements. Amending FISA to cover lone wolf international terrorists would constitute only a modest expansion of the statute. A group of terrorists currently covered by FISA might be as small as two or

three people. However, the interests that the courts have found to justify FISA procedures are not likely to differ appreciably between a case involving a group of two or three persons and a case involving a single terrorist. For example, because the international terrorism in which a lone wolf terrorist would be involved would continue to "occur totally outside of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum," 50 U.S.C. § 1801(c)(3), these circumstances would implicate the "difficulties of investigating activities planned, directed, and supported from abroad," just as current law implicates such difficulties in the case of foreign intelligence services and foreign-based terrorist groups. *United States v. Duggan*, 743 F.2d 59, 73 (2d Cir. 1984). Moreover, information developed in the investigation of a lone wolf terrorist, just as in the case of the investigation of a foreign terrorist group, requires special handling because of the need to maintain the secrecy of lawful counterintelligence sources and methods.

The Department does not support an alternative creating a presumption that an individual planning a terrorist attack is an agent of a foreign power. The Department believes that FISA should cover all non-U.S. person lone wolf terrorists. Under the alternative, however, the FISA court would have the ability to deny the government's request for FISA surveillance even if the government were able to show probable cause that the alien in question was engaging or preparing to engage in international terrorism. For this reason, the alternative would not plug the current gap in FISA's coverage as effectively as would section 4 of H.R. 3179.

3. Please provide an example of a particular instance in which the Department was unable to obtain a surveillance order for a suspected terrorist because it could not establish that the target was a foreign power or an agent of a foreign power. If such cases exist, please explain for each such case why the Department was unable to obtain a title III surveillance order.

One case study of this type of issue that is available in unclassified form is the discussion of the Zacarias Moussaoui matter in the 9/11 Commission Report at pages 273-276.

4. Prior proposals have extended the "lone wolf" provision to cover both U.S. persons and non-U.S. persons. Although section 4 of H.R. 3179 applies only to non-U.S. persons, I am concerned that if we pass this provision, the FBI and Justice Department will return to this Committee and ask that we extend it to U.S. persons. Can I get your commitment that the Department will not come back here and ask for that?

The Department does not have any plans to ask Congress to amend FISA to cover U.S. person lone-wolf terrorists.

5. Section 5 of H.R. 3179 permits the Department to make *ex parte* requests of courts for authorization to withhold classified information from defendants.

(a) Since September 11, 2001, where the Department has sought the ability to withhold classified information from defendants, in how many instances have the courts denied the government the ability to make such requests *ex parte*? For each such instance, what reason did the judge give for denying the request?

The Department does not keep records regarding the number and disposition of such requests.

(b) In how many instances have the courts allowed the government to make such requests *ex parte*?

The Department does not keep records regarding the number and disposition of such requests.

6. Section 5 of H.R. 3179 permits the Department to request orally that classified information be protected. Why is it necessary for the Department to request protection of classified information under the Classified Information Procedures Act orally? Is it not true that a classified or redacted written request could be maintained in the case file so that there is a clear and complete record of what transpired?

There have been several occasions where an issue involving the discovery of classified information has unexpectedly arisen during a trial. The ability to make an oral request for protection under section 4 of CIPA would allow the prosecutor to seek a ruling from the court promptly, without having to seek a delay in the proceedings. There are also times where the classified information for which protection is sought is complex or arcane. Oral presentation to the court, and the ability to answer any questions the court may have, in such cases may afford the government the most efficient and practicable way to advocate its position. More importantly, the oral presentation may aid the court in ruling correctly. In *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (1998), the Ninth Circuit Court of Appeals held that the trial court did not err in holding ex parte hearings under section 4 of CIPA saying, "Such a hearing is appropriate if the court has questions about the confidential nature of the information or its relevancy." H.R. 3179 would codify this holding.

It is certainly true that a written request for an authorization under section 4 of CIPA could be maintained in the case file so that there is a clear and complete record of what transpired. With respect to an oral request for an authorization pursuant to section 4 of CIPA, however, a court reporter could be present to transcribe the proceeding, thus providing a clear and complete record of what transpired for the case file. In fact, the Department requests as a matter of general practice that a court reporter be present to transcribe the proceeding when prosecutors make an oral request for a CIPA authorization ex parte and in camera, and the Department does not anticipate changing this practice in the event that H.R. 3179 is enacted into law. Furthermore, the last

sentence of section 4 of CIPA states, "If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal," and this requirement would be unaltered by H.R. 3179.

7. Your testimony indicates that section 6 of H.R. 3179 would expand the exception that allows the government to withhold notice of FISA evidence in alien terrorist removal proceedings to all other immigration proceedings. The existing exception (8 U.S.C. § 1534(e)) specifically restricts notice and disclosure of FISA information "if disclosure would present a risk to the national security of the United States."

(a) Since September 11, 2001, how many immigration proceedings have occurred where the government had information on an alien obtained via FISA (regardless of whether the evidence was used)?

Before answering this question, I would like to correct a statement made in the preface to the question. While 8 U.S.C. § 1534(e) authorizes the government to withhold FISA information from aliens only if disclosure would present a risk to the national security of the United States, that provision does not similarly condition the government's ability to withhold from an alien the fact that certain information was obtained pursuant to FISA. Rather, the government, pursuant to 8 U.S.C. § 1534(e), may decline to inform an alien that information to be used against him was obtained pursuant to FISA in any alien terrorist removal proceeding.

Returning to your question, the Department does not possess these specific statistics.

(b) In how many of such cases was there a national security nexus? Please provide detailed information regarding the national security nexus for each case.

The Department does not possess these specific statistics. FISA tools, however, are frequently employed in investigating foreign terrorist organizations that have a presence in the United States, and national security or terrorist activity judgments are generally implicit in FISA court grants of surveillance authority. As such, the very large majority, if not all, of national security related immigration investigations of aliens to which FISA derived information may relate, will by definition have a national security or terrorist activity nexus. To the extent that this question seeks detailed information regarding the specifics of FISA-related national security matters, it calls for the disclosure of classified information, and information reflecting the exercise of prosecutorial discretion in specific cases which the Department has long declined to produce in response to congressional inquiries.

(c) In how many of such cases was there a terrorist activity nexus? Please provide detailed information regarding the terrorist activity nexus for each case.

See answer to question 7(b).

(d) Please answer the following question with a number or percentage. In how many of such cases was there no national security or terrorist activity nexus?

See answer to question 7(b).

(e) Would the Department support an amendment that limits the exemption proposed in section 6 to those situations in which a judge determines that disclosure "would present a risk to the national security of the United States."? If not, why not?

The Department supports the language currently contained in section 6 of H.R. 3179. As explained above, the language quoted in your question applies to the disclosure of evidence to an alien in an alien terrorist removal proceeding and does not apply to the notification that certain evidence to be used in such a proceeding against the alien was derived from FISA. H.R. 3179, however, does not address the question of whether evidence will be disclosed to an alien in an immigration proceeding, but only addresses the question of whether an alien will receive notification that evidence to be used against the alien in an immigration proceeding was derived from FISA. The Department therefore does not see the need for including the language from your question in section 6 of H.R. 3179.

(f) If section 6 were to be enacted, please explain how a person facing detention or removal could challenge the lawfulness of FISA surveillance used in support of that detention or removal.

The question assumes a dubious legal proposition about existing law, that such a right exists apart from H.R. 3179. It has been settled since 1984 that aliens in deportation proceedings generally have no Fourth Amendment right to challenge the lawfulness of government searches or seizures leading to evidence subsequently used in those proceedings. In *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984), the Supreme Court ruled that the Fourth Amendment's exclusionary rule was generally inapplicable to deportation proceedings. *Id.* at 1050-51. The Court held that the exclusionary rule generally has no application in that context, particularly where an alien's unlawful presence in the United States constitutes a continuing violation of the law. The Court concluded that an alien does not possess the right to challenge or otherwise seek suppression of such evidence. The Court reserved the question of whether even "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained" might require a different result. In light of the foregoing, it would be

superfluous to provide an alien notice that information he cannot get suppressed in the proceeding was obtained through FISA.

8. With respect to the changes proposed by section 6 of H.R. 3179, please provide any specific examples where a defendant has jeopardized a case because he or she was allowed to petition a court to have access to FISA evidence. If such cases exist, please explain how they were resolved.

This question evidences a fundamental misunderstanding of section 6 of H.R. 3179. That provision does not alter the rules governing when the government is obliged by law to disclose to an alien in an immigration proceeding evidence gathered pursuant to FISA. Rather, section 6 of H.R. 3179 would only eliminate the requirement that the government must notify an alien that information to be used in that alien's immigration proceeding was gathered pursuant to FISA. This requirement should be eliminated because it presents the government a Hobson's choice: it either will not use the information in immigration proceedings, and possibly permit dangerous aliens to remain in the country; or it will use the information, and risk jeopardizing sensitive ongoing investigations by notifying an alien that it is using information acquired through FISA.

9. Your testimony indicates that if section 6 of the bill became law, the government would still be required to disclose information it plans to use at immigration proceedings to aliens if such disclosure is "otherwise required by law." Please list and explain all legal obligations that could require the disclosure of FISA evidence in immigration proceedings and what, if any, limitations exist on the Department's obligation to make such disclosures.

An alien's right, vel non, to FISA or other confidential government information is dependent on the alien's immigration status, the nature of the proceeding in which he finds himself, or the benefit or relief from removal that he seeks. The Immigration and Nationality Act currently provides for a range of procedural constructs that vary with the context. It generally provides for no discovery, and the Federal Rules of Evidence, Civil and Criminal Procedure have no application. In general, the Government discloses to the alien any evidence that it uses against him, but the exceptions are notable and long-standing in immigration jurisprudence and for the most part are codified. An alien in a removal proceeding has a purely statutory confrontation right, that of a "reasonable opportunity" to examine evidence or confront witnesses that the government uses against him in the deportation case-in-chief, INA section 240(b)(4)(B), "but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition the alien's admission to the United States or to an application by the alien for discretionary relief . . . ." That right is not Sixth Amendment based, and the use of undisclosed confidential information to deny admission or discretionary benefits has been long settled in decisions of the Supreme Court and other courts. *See e.g., United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (exclusion); *Jay v. Boyd*, 351 U.S. 345 (1956) (discretionary relief); *United States ex rel. Barbour v. INS*, 491 F.2d 573, 578 (5th Cir. 1974) (classified evidence to detain aliens pending deportation proceedings), *cert. denied*, 419 U.S. 873 (1974).

INA section 240(c)(2) affords an alien in proceedings access to his visa, other entry documents, and other records pertaining to his admission or presence in the United States, but that section expressly excepts from disclosure any documents "considered by the Attorney General to be confidential." INA section 235(c), applicable to national security or foreign policy related admissions cases, has since 1952 provided for the exclusion of aliens on undisclosed national security information when the Attorney General, "after consulting with appropriate security agencies of the United States Government, concludes that disclosure of the information would be prejudicial to the public interest, safety, or security." In *Knauff*, the Court upheld a regulatory forebear of 235(c) that had been in effect since 1917. The Alien Terrorist Removal provisions, INA section 1531, et seq., on which section 6 of H.R. 3179 is modeled, expressly authorize the Government to proceed against a deportable terrorist alien, even one in permanent resident status, on the basis of undisclosed classified information and an unclassified summary, and even without a summary in some circumstances. Of course, INA section 1534(e) then generally precludes FISA notice, 18 U.S.C. § 3504 motions, and suppression hearings, and 1534(h) provides that the Federal Rules of Evidence have no application.

10. Your testimony says there are cases where the Department, in the interest of protecting on-going investigations, has decided not to use FISA evidence in immigration proceedings.

(a) How many such proceedings have there been since September 11, 2001? How many persons were involved? Describe such cases.

The Department does not possess these specific statistics and suggests that you contact the Department of Homeland Security, which handles such administrative proceedings.

(b) How many of such persons were found deportable on immigration charges?

The Department does not possess these specific statistics and suggests that you contact the Department of Homeland Security, which handles such administrative proceedings. To be sure, the Department is aware of cases in which the Government succeeded in removing aliens as to whom it possessed confidential national security or FISA information, without using that information, but (a) such cases presented alternative garden-variety proofs, (b) the aliens conceded deportability, or (c) their relief applications were non-meritorious or denied as a matter of discretion for reasons other than national security or FISA information. In other words, the alien presented us with a basis to remove him without having to expose the classified information. Unfortunately, however, this may not always be the case.

(c) On what grounds were they deported?

See answer to question 10(b).

(d) If any of such persons were deported, doesn't that mean that current law was sufficient and the FISA evidence was not necessary to deport that individual?

The fact that some of these aliens were deported does not mean that current law is sufficient. To the extent that the notification requirement related to the use of evidence gathered pursuant to FISA in immigration proceedings results in any dangerous aliens remaining in the country, a problem exists that needs to be corrected.

(e) If there are cases where the person was not deported, were they released or are they in detention on immigration or other grounds?

See answer to question 10(b).

(f) Please provide detailed information on those cases where a deportation of a dangerous person was thwarted because FISA evidence was not used.

This question calls for "detailed information" regarding the specifics of FISA-related national security matters, and thus calls for the disclosure of classified information, and information reflecting the exercise of prosecutorial discretion in specific cases, information which the Department has long declined to produce in response to congressional inquiries.

11. Please provide the names and the charges filed against the 310 individuals you referred to as "being charged with criminal offenses as a result of terrorism investigations." Please also provide the districts in which those charges are pending. Also please submit a copy of all indictments, plea agreements, and guilty verdicts for such persons.

Most of this information is included on the attached chart. The chart does not include information that is presently under seal. The Department is currently querying various U.S. Attorney's Offices for the remaining information and will forward it under separate cover as soon as it is compiled.

12. Please provide detailed information regarding the 179 convictions you have obtained "as a result of terrorism investigations." Include the charge against each person, the disposition of each charge, the charge(s) for which each person was convicted, and the sentence imposed for each person for each charge.

Most of this information is included on the attached chart. The chart does not include information that is presently under seal. The Department is currently querying various U.S. Attorney's Offices for the remaining information and will forward it under separate cover as soon as it is compiled.

13. At the May 18, 2004 hearing, in discussing whether National Security Letters violate the Fourth Amendment rights of a person whose information is sought, you stated: "Terrorists have no such Fourth Amendment right."

(a) Is it not correct that, at the stage of an investigation when information about a person is sought through an NSL, that person has not yet been convicted of a terrorist offense?

At the stage of an investigation when information about a person is sought through an NSL, it is generally the case that the person in question has not yet been convicted of a terrorism offense.

(b) Is it the Department's position that a person who is suspected or accused of a terrorist offense, but not convicted of one, has no Fourth Amendment rights?

That is not the Department's position. Of course, a person who is suspected or accused of a terrorist offense continues to possess Fourth Amendment rights. Chairman Coble, however, asked me whether National Security Letters violate the Fourth Amendment because "we don't inform the terrorist or the target that they're under investigation," and the answer to this question is no. No person, whether or not he or she is suspected of a terrorist offense, has the constitutional right to be notified when records pertaining to him or her are requested from third parties, such as electronic communications service providers, through NSLs. Rather, it is well established both that the target of an investigation has no right to notice of subpoenas issued to third parties, *see SEC v. O'Brien*, 467 U.S. 735, 742 (1984), and that a person, even if not the target of an investigation, has no right to notice of the fact that information pertaining to him or her has been requested from a third party. *See Reporters Comm. for Freedom of the Press v. American Telephone & Telegraph Co.*, 593 F.2d 1030, 1044 (D.C. Cir. 1978). In addition, it is important to note that the Supreme Court has made clear that a request for records, such as an administrative subpoena or a National Security Letter, does not constitute a "search" or "seizure" under the Fourth Amendment. *See United States v. Dionisio*, 410 U.S. 1, 9 (1973); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 195 (1946).

14. At any time during the period between and including September 25, 2001, and October 12, 2001, did anyone in the Department ever indicate to any Member of Congress or their staff that revising the PATRIOT Act (as reported by the Judiciary Committee) before it was considered by the Rules Committee or the full House would "benefit the Republican Party politically" (or words to that effect)?

We have no specific knowledge that the quote above can be attributed to a Department employee. If the Committee cares to provide additional information, it may assist us in being more responsive. However, we note that many of the individuals who worked with Congress to pass the USA PATRIOT Act are no longer employed by the

Department. Thus, even if we were to undertake an exhaustive search to confirm whether the above quote came from a Department employee, it might very well yield no definitive results.

15.

(a) Does the Department believe that an essential component of the war on terrorism is keeping weapons out of the hands of terrorists?

Fighting terrorism is the Department of Justice's top priority. At the same time, the Department is committed to fighting gun crime aggressively.

(b) Is it not true that extending the assault weapons ban would help keep weapons out of the hands of terrorists?

See the answer to question 15(c) below.

(c) It is not true that the Department could better track terrorists if terrorists could be searched in NICS? Has the Department sought legislation from Congress to extend the assault weapons ban and clarify NCIS? If not, why not?

Under the Brady Handgun Violence Prevention Act, before a Federal Firearms Licensee (FFL) can transfer a firearm, the FFL must request a background check through the National Instant Criminal Background Check System (NICS) to determine whether the prospective firearm transfer would violate Federal or State law.

Congress decides who should be able to possess a firearm, and has specified several categories of persons who may not lawfully possess guns. For example, felons, illegal aliens, and adjudicated domestic abusers are all prohibited from possessing or receiving a firearm by law. Suspected membership in a terrorist organization is not a prohibited category, and the FBI cannot legally prohibit people from receiving a firearm based on their alleged association with a terrorist organization, unless they are otherwise prohibited from possessing a firearm under Federal law.

Just as a state trooper could not arrest a person merely because his name is in the FBI's terrorism database, the FBI cannot prohibit a person from purchasing a gun based only on a suspected association with a terrorist organization. Being a suspected member of a terrorist organization doesn't disqualify a person from owning a gun any more than being under investigation for a non-terrorism felony would.

The NICS checks three databases maintained by the FBI, including the National Crime Information Center (NCIC) (*e.g.*, information on fugitives and persons subject to domestic violence protection orders), the criminal history records in the Interstate Identification Index (*e.g.*, arrests and convictions for felony and misdemeanor offenses), the non-criminal history based records in the NICS Index (*e.g.*, persons with dishonorable

discharges or disqualifying mental health histories), and, in the case of a non-citizen gun buyer, the immigration records of the Bureau of Immigration and Customs Enforcement, Department of Homeland Security.

Among the records in the NCIC checked by the NICS are records on persons identified as known or possible members of terrorist organizations in the NCIC Violent Gang and Terrorist Organization File (VGTOF). Until February 3, 2004, however, because suspected or actual membership in a terrorist organization does not by itself prohibit a person from receiving or possessing a firearm under Federal or State law, NICS checks hitting only on a VGTOF record (and if no prohibiting factors were identified) would not result in a delay or denial of the transaction.

However, as part of an audit the FBI began conducting in March 2003 of completed NICS transactions involving aliens, when a NICS check hit on records entered into the NCIC from sensitive counter-terrorism investigative files that could contain prohibiting information not yet posted in the automated databases, FBI personnel coordinated to determine whether the field had additional information showing that the person is prohibited.

For example, the field office that entered the record may have information that the person is a prohibited alien who did not reveal the fact he is not a U.S. citizen on the firearms form or is subject to a want or sealed warrant that has not yet been entered into the NCIC fugitive file. In 2 out of 13 cases in the audit in which the VGTOF records matched the gun buyer, the field did have prohibiting information that was not in the automated databases.

Based on the results of the FBI audit of alien transactions, on November 17, 2003, the Acting Deputy Attorney General issued a directive to the FBI requiring it to delay for up to three business days all NICS transactions that hit on records of persons identified as known or possible members of terrorist organizations or violent gangs with records in VGTOF. The FBI implemented the directive on February 3, 2004, and now delays all NICS checks that hit on VGTOF records.

The delay allows the FBI to coordinate with field personnel who may have prohibiting information about the person not yet posted in the automated databases. If such prohibiting information is developed through contact with field personnel, then the transaction can be denied; if no prohibiting information is developed, then the sale will be allowed to proceed, because suspected membership in a terrorist organization is not a basis for denying the transfer of a firearm.

Pursuant to an order of the President, the State Department's TIPOFF records and all other terrorist watch list records held by the Federal government, are being consolidated by the FBI in the Terrorist Screening Center (TSC). A large number of the TSC's consolidated watch list records have now been entered into VGTOF and are being check by the NICS through the process described above.

As a result of these new procedures established under existing law, additional authority is not needed in order to enable NICS to check terrorist watchlists.

Responses to Post-Hearing Questions Submitted by Rep. John Conyers, Jr. for Thomas J. Harrington, Deputy Assistant Director, Counterterrorism Division, FBI

16. Please answer the following questions with numbers. How many National Security Letters have been issued since September 11, 2001? How many were for terrorism investigations? How many were for intelligence activities?

Response:

Pursuant to statutory reporting requirements, this classified information is provided to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence. It is our understanding that you have access to this information.

The statutory authorities for the issuance of NSLs require certification by senior FBI officials that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the First Amendment to the United States Constitution. The FBI does retain various categories of statistics regarding NSLs, but it does not retain the break down of NSLs issued pursuant to terrorism investigations versus intelligence investigations.

17. What language is used to notify National Security Letter recipients that they may not disclose the fact that they have received the NSL and that disclosure is a violation of federal law?

Response:

Each of the statutes that authorizes the issuance of NSLs (the Electronic Communications Privacy Act, Right to Financial Privacy Act, and Fair Credit Reporting Act) contains specific language to the effect that no officer, employee, or agent of the institution or entity being served may disclose to any person that the FBI has sought or obtained access to information or records under the relevant statute, and this information is conveyed in the notification letter.

18. Since September 11, 2001, in how many instances have recipients of National Security Letters failed to comply with the gag order? In how many of those cases did you have evidence that the disclosure was committed with the intent to obstruct an investigation or judicial proceeding?

Response:

The FBI is unable to provide an accurate response to this question for several reasons. First, it is unlikely that the FBI would learn of every violation of the

non-disclosure provision. Although we have been alerted to some such incidents, this information has come to us informally, and not through any particular information channel. Second, even when an FBI employee learns of violation of a non-disclosure provision, there is no formalized process by which the FBI records such violations, either at the field level or at FBI headquarters. Thus, while FBI headquarters has anecdotal evidence of several instances in which the party on whom an NSL is served has alerted the target, violating the non-disclosure requirement, we do not have more specific information as to these violations. We also do not have evidence as to the intent of the disclosure on these occasions.

19. Please answer the following question with a number. Since September 11, 2001, in how many instances have recipients of National Security Letters failed to turn over the requested information?

Response:

The FBI is unable to provide an accurate response to this question because there is no formalized requirement for recording non-compliance. Anecdotally, FBI headquarters is aware of several instances of intentional non-compliance, wherein the recipient has failed to respond to an NSL because it did not believe that it fell within the rubric of the relevant NSL statute. Moreover, FBI headquarters is generally aware of the fact that some institutions and entities give low priority to responding to NSL requests because the legal authorities under which a request is made provide for neither a self-executing enforcement authority nor payment of ordinary expenses. Thus, some NSL requests are either not responded to at all, or not responded to in a timely enough fashion to aid the related investigation.

20. Section 505 of the USA PATRIOT Act expanded the authorization for National Security Letters by removing the requirement of individualized suspicion.

(a) Is the FBI using this or any other authority to issue NSLs that request entire databases? If so, please list the statutory authority used.

Response:

The answer to this question is classified and is included in the answer submitted under separate cover in response to question #3 from Representative Bobby Scott.

(b) If so, what types of databases are being sought? Also, if any NSLs were used to obtain computer databases, please so indicate and give the size of each database in terms of computer memory used and number of records contained therein.

Response:

The answer to this question is classified and is the same as the answer submitted under separate cover in response to question #3 from Representative Bobby Scott.